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PANEL DISCUSSION:
THE FUTURE OF INVESTOR STATE DISPUTE SETTLEMENT AND THE IMPLICATIONS FOR THE ENERGY INDUSTRY

Andrew T. Clarke, Moderator

Prof. Peter Cameron, Panelist
Timothy Foden, Panelist
Alexis Mourre, Panelist
Prof. Marike Paulsson, Panelist
Baiju S. Vasani, Panelist

Panel discussion part of the 6th ITA – IEL – ICC Joint Conference held in Houston, Texas on January 24-25, 2019.

The use of international arbitration as the key mechanism in Investor-State Dispute Settlement (ISDS) is under concerted attack with significant implications for cross-border energy investments. What is driving this rhetoric and is it justified? Is Civil Society opposition to ISDS related to the resurgence of resource nationalism in Africa, or is it another aspect of sovereign states wanting to 'take back control'? Are international investment courts the solution, or just new problem for investors? These issues are being discussed in many venues, but will the proposed solutions bring the foreign direct investment needed to solve the real issues the world faces, or actually undermine it?

ANDREW T. CLARKE: Good morning. This is the ISDS panel discussion, and I will be moderating. Let me introduce the panel participants. We have Alexis Mourre from the International Chamber of Commerce (ICC) in Paris; Professor Peter Cameron from Dundee University; Tim Foden from LALIVE in London; Professor Marike Paulsson from the University of Miami and also with Albright Stonebridge Group; and Baiju S. Vasani from Jones Day.

There are currently 2,369 bilateral investment treaties (BITs) in force as well as 311 other trade or multilateral treaties with investment provisions.[1] These form the framework of the investment treaty system that provides protections for encouraging investment abroad.

[1] United Nations Conference on Trade and Development (UNCTAD), *International Investment Agreements Navigator*, INVESTMENT POLICY HUB, https://investmentpolicyhub.unctad.org/IIA.

In 2018, 26 new international agreements were signed, which is slightly down from 33 in 2017 and 41 in 2016. And yet there is, what has been described as, a growing backlash against ISDS that is driving a concerted effort to reform this system. The fora in which this can be seen include the deliberations on ISDS reform taking place at the United Nations (UN) Commission on International Trade Law (UNCITRAL) Working Group III, the proposal to modernize the Energy Charter Treaty (ECT),[2] new forms of bilateral investment treaties, e.g., new Dutch model BIT,[3] the Stockholm Treaty Lab experiment, group-thinking new ways of creating investment protections for renewable projects, and the Belt and Road Initiative treaties arising from the Chinese development program.[4] Parallel structures have been proposed and are now being introduced. For instance, the investment court established under the Canada-European Union (EU) Comprehensive Economic and Trade Agreement (CETA).[5] These were sparked by a broad reaction to the scope and structure of investment protections, which many non-profit organizations (NGOs) are critical of, and various United Nation organizations, such as UN Conference on Trade and Development (UNCTAD), are now espousing.

What is behind these trends? Is it that states are uncomfortable with the obligations that go with the benefits they receive from international investment? Or, is it simply that they do not want to be sued? Our panel of experts can help put this into context. I now turn to Peter Cameron to lead the charge.

PROF. PETER CAMERON: When it comes to the state perspective on ISDS, there are three important concerns commonly attributed to states.

The first concern is the stance that ISDS is not contributing to development.

[2] Energy Charter Treaty (ECT), Dec. 17, 1994.

[3] The Netherlands Draft Model BIT, May 16, 2018, https://www.internetconsultatie.nl/investeringsakkoorden.

[4] For more information, see generally Priyanka Kher & Trang Tran, *Investment Protection Along the Belt and Road*, The International Bank for Reconstruction and Development / The World Bank, Macroeconomics, Trade, & Investment (MTI) Group, Discussion Paper No. 12 (Jan. 24, 2019), http://documents.worldbank.org/curated/en/373561548341008857 /Investment-Protection-Along-the-Belt-and-Road.

[5] Comprehensive Economic and Trade Agreement (CETA), Canada-EU, Oct. 30, 2016.

However you define it, development is extremely important for many of the countries that receive international investment. States are obviously giving certain things away to obtain that investment, and one of them is ISDS. When states agree to it, however, they do not receive, as they believe, sufficient in return.

The second concern is losing cases. This concern is strong. The amounts in damages when states lose can be substantial, which may turn them away from the system. Indeed, the award-debts damage state budgets, and this is a serious risk as far as states are concerned.

Finally, the third concern is that there is a lack of ready evidence of real benefits to states for accepting ISDS. "You say it is essential, you say it is important, but what are the benefits to us as states?"

Turning to the first point on development, it can be reasonably argued that if hydrocarbons and minerals are not turning the country into a Norway, then the lack of development in the country concerned is the state's responsibility, rather than then investment regime. This might be correct, but it is unlikely to be accepted by the government or the wider public in the country concerned. The result is that we are seeing obligations being introduced in treaties that are socio-political in nature, for example, corporate responsibility. This is exemplified in the Pan-African Investment Code[6] and the Southern African Development Community (SADC) model BIT.[7] The question then arises of how courts are going to interpret the language in these kinds of provisions because it tends to be ambiguous.[8]

Regarding the second point on losing cases, the statistical evidence available does not support this proposition. Generally, states tend to win more than investors, and even when investors win the damages are often much less than those sought.

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[6] Draft Pan-African Investment Code, Dec. 2016, https://au.int/en/documents/20161231/pan- african-investment-code-paic.

[7] SADC Model Bilateral Investment Treaty Template, July 2012, https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf.

[8] *See*, *e.g.*, Agreement for the Promotion and Protection of Investments, Can.-Mong., art. 14, Sept. 8, 2017.

Nonetheless, the fallout can be considerable if a state loses a case. A commonly heard view is that, after all, states are exercising their regulatory powers without which they cannot function. Moreover, states often consider that the damages awarded against them are unfair and out of proportion. The *Yukos Universal limited v. Russian Federation*[9] case is an outlier, but there are other cases where damages are extraordinary and are likely to have a negative impact on the state's budget—Nigeria is a recent example. In response, the EU has proposed to move away from ISDS altogether and establish a multilateral investment court.[10] In different responses, there has been a growth of regional or local arbitration institutions, which may have the effect of legitimizing the existing regime, because this does not present a challenge to it. ISDS is not abandoned—it is getting a regional makeover.

The third point concerns the benefits of ISDS from the state's perspective? "You say you need it, Mr. Investor, especially because our local courts are untested, unreliable, etc. So, if we give it, what do we get out of it?" There is a sense that there is not enough coming back to the state. I will not argue for or against that proposition. It is just one that bears mentioning.

The growth of alternative legal service providers—largely to meet government needs—is also noteworthy. Again, from this we can infer that ISDS is a system that will not go away. But if it is to stay, it may be managed slightly differently. We have seen the growth of NGOs providing legal advice. There are other associations as well, perhaps made up of retired lawyers who are active in this field. Additionally, there are the regional development banks and the African Legal Support Facility[11] that are

[9] Yukos Universal Ltd. v. Russian Federation, PCA Case No. AA227, Award (July 18, 2014) (calculating damages at over US$66 billion).

[10] *See* European Commission, *Investment in TTIP and beyond—The Path for Reform: Enhancing the Right to Regulate and Moving from Current Ad Hoc Arbitration Towards and Investment Court* at 4 (May 5, 2015), http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF ("the EU should work towards the establishment of an international investment court and appellate mechanism with tenured judges with the vocation to replace the bilateral mechanism which would be established").

[11] *See* African Development Bank Group, African Legal Support Facility https://www.afdb.org/en/topics-and-sectors/initiatives-partnerships/african-legal-

concerned with advising their member governments on how to deal with disputes. There is an emerging counter force to western law firms. Those that advise investors on bringing investment claims are now facing an alternative legal force supporting states.

BAIJU S. VASANI: If there were two questions that I had in 2018, they would be encapsulated as follows.

First question: how has this backlash affected the ISDS practice? The answer is that it has affected it positively because all the news and attention has increased awareness among investors, and they are now cognizant of the benefits of investment treaties. We have therefore seen an increase in matters, particularly in regard to counseling and restructuring where clients now understand that these treaties are there to protect them.

The second question that I have received often—in fact, I had an associate who came to me with this particular query—is: are you not worried that your ISDS practice is going to die? What are you going to do for the rest of your career now that ISDS is dead? This associate said that he wanted to diversify his practice. "I love working, Baiju, I really like your ISDS stuff, but I think I should do more appellate work." Needless to say, he is doing more appellate work now.

I do, however, accept the question and rise to the challenge. I want to address the question whether there will be a further increase in the high-water mark of work that we are going to see; or are we now seeing the death knell of ISDS?

I am going to predict that ISDS in its current form, mirroring commercial arbitration with party-appointed arbitrators and without court procedures, will stay for decades to come. ISDS, as it is, is not going anywhere. That is my prediction, and I welcome challenges from my fellow panelists and from the floor that argue otherwise.

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%20African%20countries.

The death knell has come about many times. Latin American countries pulled out of the International Centre for Settlement of Investment Disputes (ICSID) Convention on the Settlement of Investment Disputes between States and Nationals of Other States;[12] Venezuela, Bolivia, they began denouncing the Convention and everyone thought there would be a domino effect. But it did not happen, and if you look at how much engagement there is with the current ICSID rule amendments, it shows that states are today supporting the ICSID system.

Then there was the termination of treaties, *e.g.*, by South Africa, Indonesia, and Russia. Many states claimed that they would terminate their treaties. A few indeed did, and there is support for terminating intra-EU BITs, which is significant given the sheer number of them. There is also NAFTA 2.0 that is not particularly great for ISDS, and we have seen a retreat notably by Canada from the treaty negotiations. This, however, has to be balanced against the number of BITs that are being signed, notably in Asia. Taking, for example, the Chinese, Koreans, and Japanese, and looking at the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP),[13] the movements are neutralized. BITs and multilateral treaties are not going anywhere. Even within the EU, all we are going to see is a restructuring, like Dyson moving from the UK to Singapore: European companies will shift and restructure to sidestep the demotion of intra-EU BITs.

What is so exciting is the EU's support for a multilateral investment court. Again, I predict that it is not going to happen; there will be no multilateral investment court. The idea that all the states are going to convene and agree on, for instance, who will sit on this court, what nationality they will have, how they will be appointed, whether it will be by election, etc., is fanciful. Moreover, there will be points of conflict between developing and developed states, from states with different political views. It would be easier to maintain the *status quo*, albeit with a few modifications, but

[12] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter "ICSID Convention"].

[13] Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), Feb. 4, 2016.

everything really remains as it is.

There is the argument that an investment court would create a precedent and bring consistency to ISDS, but there are over two and a half thousand treaties with different text and languages. What precedent can come out of that? It is not as if there is one treaty text in *one* language applying to all; there is no multilateral investment treaty for the world. Therefore, we are never going to create a precedent. It is better to have *jurisprudence constante* where an outlier decision can be circumvented, and a subsequent case decided differently. Whereas if there is a system of precedent and a bad decision is rendered, it might hinder the ISDS system for years to come.

Others also claim: "Well, okay, Baiju, we want people like you out. You are a *double hatter*." I am an ICSID arbitrator and ICSID counsel. They say: "We do not want people like you who represent these bad investors, and then you sit as arbitrator. You do not have a public law background; you are not an administrative law expert." I question whether there is bias; there are statistics suggesting there is none. I also question whether "double hatting" is really an issue because when there is a true conflict, it can be addressed with arbitrator challenges. For investors, however, I think the court will be problematic because the judges will view these disputes through a public law lens. This means there will be a margin of appreciation and discretion for states. Therefore, instead of equality of arms between investors and states, the prism will change in that disputes will be analyzed through the lens of the state; it will be an elaborate judicial review as opposed to a dispute between equal parties.

Finally, in opposing the backlash against ISDS, a difficult position to maintain is that foreign investors should be granted special treatment over domestic investors. In reality, what is so special about foreign investors versus domestic investors? It is a difficult thing to disagree with. The statistics do show there is some correlation between BITs and Foreign Direct Investment (FDI), but not enough to give the class their own special system. We should move to a system that protects investment as opposed to foreign investment because the concept of foreign investment has

become artificial. Today anyone can make a foreign investment and become a foreign investor. Money moves with a simple click of a button. It is not the 1960s where everything was confined. The idea itself that we need FDI as opposed to direct investment is flawed. Furthermore, the multilateral court will be protecting FDI and as long as that is the case, the populace, the Elizabeth Warrens, the Bernie Sanders, everyone in Europe, will continue saying: "Why are you treating these foreigners better?" For this reason, the court will be a process that is not going to work particularly well.

ANDREW CLARKE: Thank you, Baiju. Let us now have a look at the historical context. I ask Marike to comment on this.

PROF. MARIKE PAULSSON: From a historical perspective, there are three lessons to take away. The first lesson begins in the 1840s and 50s. During this period, Lord Palmerston, Britain's foreign and prime minister, famously defended gunboat diplomacy. In international politics, gunboat diplomacy or "big stick policy" refers to the pursuit of foreign policy objectives with the aid of conspicuous displays of naval power, implying a direct threat of warfare. Today, we do well to remember that those kinds of tactics can lead to undesired outcomes. We also do well to remember that when we decide to dispose of a system, *e.g.*, the current system of ISDS that functions well for investors, it can backfire and negatively affect international trade, as well as peaceful commerce. As stated by George Ridgeway, if the international community sees profit in peaceful commerce, it is less likely to disrupt it by fighting wars.[14]
When it comes to sovereignty, I tend to reference Fali Nariman from India who says that sovereign states are like billiard balls: they often collide but seldom do they go in the same direction.[15] And in the White House, we now have something more like a

[14] *See* GEORGE RIDGWAY, MERCHANTS OF PEACE: 20 YEARS OF BUSINESS DIPLOMACY THROUGH THE INTERNATIONAL CHAMBER OF COMMERCE, 1919-1938 (Little Brown & Co. Pub. 1958) (1938).

[15] Fali S. Nariman, Intervention at the International Council for Commercial Arbitration (ICCA) 3rd Session of Introduction to the New York Convention – The Convention and Sovereignty: Judicial Dialogue on the New York Convention (Nov. 23, 2013), *available at* https://www.arbitration-icca.org/media/2/13915957715800/icca_roadshow_report_india.pdf.

bowling ball. To some extent, we have managed to replace gunboat diplomacy with ISDS. In keeping with this thought, I pose the question to those involved in the ISDS reform debate at the UNCITRAL working group: If you want to move forward with an investment court, how will sovereignty affect the court?

The second lesson takes us back to the 1990s. This is not the first time that the international community is thinking about a permanent arbitration court. In the 1990s, the arbitration community and leading arbitration scholars at the time contemplated a world court that would have had jurisdiction to hear all enforcement requests under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").[16] Although it was different than a court hearing disputes between investors and states, it is important to understand why figures like Judge Stephen M. Schwebel and Howard M. Holtzmann rejected the court at the time. Moreover, the enforcement court would have addressed a single treaty, whereas a multilateral investment court is intended to address a multitude of treaties.

What did Judge Schwebel say about the New York Convention court in the 1990s? He referred to the movie, MAN OF LA MANCHA[17] where Don Quixote dreams an impossible dream, and Schwebel said: "The court is like that impossible dream." [18] In thinking about a permanent investment court, will states appoint the arbitrators or adjudicators? If yes, are they actually sovereign appointments? Furthermore, are the states that are appointing members to the court also acting as respondents in disputes submitted to the court? If that is the case, is it then so unlike the enforcement court of the 1990s, from MAN OF LA MANCHA, given that this court actually eliminates party autonomy.

The last history lesson takes us back to 1958. Something to consider is whether decisions rendered by the multilateral investment court can be enforced under the New York Convention. In 1958, the UN delegates addressed article 1(2) of the New

[16] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 1155 U.N.T.S. 331, 7 I.L.M. 1046 [hereinafter "New York Convention"].

[17] MAN OF LA MANCHA (Produzioni Europee Associati, 1973).

[18] *See* Nariman, *supra* note 15, at 2.

York Convention,[19] which provides that awards rendered by permanent arbitral bodies can be enforced under the New York Convention. However, the then Czechoslovakian delegate argued that only awards rendered by permanent arbitral bodies could fall under the New York Convention if those bodies were not courts of justice exercising compulsory jurisdiction, irrespective of whether they were called arbitral bodies. At the time, the delegates found it essential that the submission to the permanent arbitral body had to be voluntary and the consequence of contractual freedom and the autonomous will of the parties in order for the award to fall under the scope of the New York Convention.

Reflecting on a multilateral investment court today, what happens to the element of choice? Will disputes be voluntarily submitted to the court? What will be the identity of this court? Is it actually judicial?

It is important for those participating in the UNCITRAL Working Group III to address those questions because if the court does not have an enforcement mechanism as powerful as the New York Convention, the decisions rendered by it will be a rather worthless piece of paper.

In conclusion, history reminds us that after World War II, the New York Convention delegates rejected the premise that decisions rendered by *de facto* judicial courts would fall under the New York Convention's scope simply because these courts were called permanent arbitration courts. Those existed at the time in the communist East Bloc as an expression of judicial control over business disputes and a rejection of party autonomy. We learned that gunboat diplomacy does not lead to peaceful commerce. We now know that establishing certain permanent courts might work well for Don Quixote, MAN OF LA MANCHA, but it will not likely work for foreign investors.

ANDREW CLARKE: Thank you very much, Marike. Let us turn to Tim Foden to talk about the impact that changes in ISDS or the challenges to the ISDS regime have had in light of resource nationalism.

[19] New York Convention, *supra* note 16, art. 1(2).

TIMOTHY FODEN: I come to you today with both a warning and a call to action. The warning comes from the mining sector, and it is this: Nationalism is not just about cheap looking hats with historical exhortations written on them. It is real and states from Africa to Europe to Asia have rediscovered resource nationalism. The experience of miners should be a warning to the energy sector, and this gives rise to the call to arms. The bulwark against resource nationalism is investment arbitration, yet this particular rampart is under siege. We must act to shield investment arbitration now before energy companies find themselves without effective remedies when resource nationalism turns toward the energy sector.

In the time remaining, I will briefly describe the revival of resource nationalism in the mining sector, explain the hardly coincidental intersection of resource nationalism and the attack on investment arbitration, and finally mention what people in this room may do about this particular conundrum.

Regarding resource nationalism, Tanzania provides a helpful example. In 2017, the president of Tanzania referred to mining companies as "people who call themselves investors with the intention of stealing from Tanzanians."[20] This was not simply rhetoric; the State followed through with drastic changes to the investment framework for mining. Tanzania placed export bans on all mineral concentrates, introduced unfeasible local content requirements, and created new powers for avoiding transactions that the State deemed "unconscionable."[21] Miners immediately felt the impact. For instance, Acacia, a major gold mining company, was hit with an unpaid tax bill of US$190 billion. Following the movement in Tanzania, other African countries like Ghana, Zambia, Sierra Leone, and Mali signaled their intentions of adopting similar measures.

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[20] *Magufuli says will Close all Mines if Firms Delay Talks to Resolve Tax Dispute*, The E. Afr., July 22, 2017, https://www.theeastafrican.co.ke/business/Magufuli-threatens-to-close-mines-if-owners-delay-negotiations/2560-4027536-u3cnfqz/index.html

[21] Nadine James, Editorial, *Resource Nationalism on the Rise in Sub-Saharan Africa: Heightened Risk?*, Mining Wkly., June 15, 2018 https://www.miningweekly.com/ article/resource-nationalism-on-the-rise-in-sub-saharan-africa-2018-06-15-1.

The example of the Democratic Republic of the Congo ("DRC") is also illustrative. The DRC, over the course of a single weekend radically overhauled its entire mining framework. The State removed the prior mining code's 10-year stability provision, required that 60% of all earnings be kept in local domestic banks, and hiked tax revenues on all "strategic resources," a designation left entirely to the discretion of the presidency.[22]

Resource nationalism is not limited to Africa. Over the past year and a half, Poland and the Czech Republic have also made efforts to steer mining assets away from foreign investors and into state-controlled mining companies. These States are doing this boldly and saying: We do not want these natural resources in the hands of foreign investors, of Australians, of Americans. This is a call back to the 1960s.

Many might think that this will not happen with the energy sector, after all, oil prices are down, and the "obsolescing bargain" model tends to operate only when commodity prices are high. It is still worth bearing in mind that the mineral super cycle ended years ago, and mineral prices are not incredibly high, yet resource nationalism is in full stride in that particular sector.

Furthermore, resource nationalism does not strictly correlate with high commodity prices. For instance, in 2012, when Argentina nationalized the oil company YPF, oil prices had taken a severe hit in the months leading up to that decision. It seems rather naïve to assume that low oil prices will protect energy companies from resource nationalism because nationalism itself is wildly unpredictable. Ten years ago when I read Philip Roth's brilliant 2005 novel, THE PLOT AGAINST AMERICA where a celebrity, Charles Lindbergh, rises to the presidency of the United States in the 1940s on the back of a slogan, "America First," I could not have predicted in my wildest dreams that ten years later we would have a reality television star rise to the presidency, spouting that same slogan.[23]

All of this is to say that if it happens with minerals, it can happen with oil and gas. In the event that resource nationalism encroaches on the energy sector, energy

[22] *Id.*

[23] PHILIP ROTH, THE PLOT AGAINST AMERICA (2005)

companies might find themselves bereft of effective remedies. In fact, resource nationalism is currently thriving because NGOs, states, and other actors have attacked investment arbitration as a tool of pantomime robber barons who, while twirling their mustaches, extract additional profits from states through litigation. For instance, in 2012 an NGO published a report attacking investment arbitration, and it opened with a comical epigraph that went: "There is little use in going to law with the devil while the court is held in hell."[24] The report proceeds to undermine the entire system as balanced against states.

States have also joined the act. For instance, in 2016, Italy withdrew from the ECT because it had been sued several times; and Europe has recently turned its back on the intra-EU application of the ECT. The attack on investment arbitration is not lost on states that are perusing resource nationalism; we need only look at Tanzania, which has made efforts to gut the mining framework and has banned investment arbitration altogether.

General counsel of energy companies might not be particularly troubled by this conversation because they have direct investment agreements and hence leverage with states, but independents, small and medium-sized enterprises, and smaller contractors do not have that advantage. These actors often have to rely on the investment treaty framework because they cannot bargain for an investment agreement.

Moreover, the detractors of investment arbitration are not limiting their attack to treaties; they are attacking the private tribunals that investment agreements give access to in the event of a breach. As for the leverage that major energy companies have, the past is prologue: the misapplication of that leverage in the 1952 coup[25] to the benefit of the Anglo-Iranian Oil Co. was arguably the catalyst to the very system we have today.

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[24] PIA EBERHARDT & CECILIA OLIVET, PROFITING FROM INJUSTICE: HOW LAW FIRMS, ARBITRATORS AND FINANCIERS ARE FUELING AN INVESTMENT ARBITRATION BOOM (2012) (published by Corporate Europe Observatory and the Transnational Institute) (quoting HUMPHREY O'SULLIVAN, THE DIARY OF AN IRISH COUNTRYMAN (1831)).

[25] Anglo-Iranian Oil Co. (U.K. v. Iran), Judgment, 1952 I.C.J. 92 (July 22).

In calling to arms, we cannot simply defend the system by writing articles and funding think tanks and opinion pieces. To regain the initiative, we must remind the public and policy makers of the grisly precedence of Iran and Guatemala and countless other corporate-driven *coup d'états*. As Judge Schwebel has pointed out for the past few years, investment arbitration is the best and only alternative to gunboat diplomacy. We can actually take part and work to ensure that this recent and unpleasant history does not repeat itself.

ANDREW CLARKE: That is a very useful reminder of parallel experiences from the mining industry and the implications it may have for energy in the future. In considering the institutional perspective, we are very pleased to have Alexis.

ALEXIS MOURRE: The decision by states to reform the system of investment protection is a decision that pertains entirely to states. The decision might be unrealistic or proper, but it is not incumbent on arbitral institutions or the arbitral community to question the legitimacy of that decision. Whether the ISDS reform will result in lower FDI is uncertain and perhaps impossible to predict. Looking at Europe, it is interesting that Europe is strongly opposing ISDS and simultaneously embarking on a more ambitious program of entering trade agreements around the globe than that ever set by the EU.

From an institutional perspective, it is important that stakeholders and the arbitration community are properly consulted in the ISDS debate. The ICC has taken its part in this process. In November 2017, the ICC convened with the Geneva Center for International Dispute Settlement and held round table discussions with UNCITRAL and representatives of the business sector and with the collaboration of Gabriella Kaufmann-Kohler. The ICC is also acting at the UNCITRAL Working Group III and participating in the works of that group.

The concerns that states express with respect to ISDS are serious. There are concerns over consistency, parallel arbitrations, unrelated cases, forum shopping, abuse of process in certain instances, etc. These issues are serious. Moreover, listening to Baiju, I remember a great Italian author who wrote that "everything needs

to change, so everything can stay the same"[26] to describe a strategy for maintaining power. With the ISDS reform, however, I do not think this will happen. Things will change, and we will enter a different landscape. Whether an investment court will happen is uncertain, but the most incredible things are happening around the world these days, and this might happen as well.

There are two aspects to the question of an investment court. First, in Europe, the idea that private arbitrators adjudicate disputes with states has become unsellable. Second, and at the root of the problem, investment protection is based on the net of several thousands of treaties. This creates problems with consistency and forum shopping. To resolve these problems, there must be a multilateral investment treaty dealing with the substance of the standards of protection. There was an attempt to do this between 1995 and 1998, and a draft treaty was discussed within the Organization for Economic Co-operation and Development (OECD) called the Multilateral Agreement on Investment ("MAI"). It was an ambitious project aimed at elaborating a multilateral investment treaty that provided for arbitration. Eventually however, the public became aware of the project because some NGOs took this to the press, which created a political concern. Furthermore, the then socialist government in France withdrew from the discussions, and this ended the multilateral investment treaty project. At the time, the ICC strongly supported the project, and it would still provide support today because it is the policy of the ICC to defend multilateralism, but it is difficult to think that this will happen again.

Regarding current ISDS reforms, the ICC has expressed concerns over a multilateral court as proposed by the EU on three points. The first is party equality, and particularly the constitution of arbitral tribunals because investors will no longer have the possibility of selecting their arbitrators. With a court, there will be a panel of arbitrators chosen by the states, which is a cause for concern.

Another cause for concern is the neutrality of the entire process, on one side, because the panels would be selected exclusively by state parties and, on the other, because of the narrowing pool of available arbitrators and the risk of conflict of

[26] GIUSEPPE TOMASI DI LAMPEDUSA, THE LEOPARD (1958).

interest.

Finally, there is an inefficiency risk resulting from the unavailability of experienced international arbitrators.

All this being said, the possible introduction of a multilateral court will not replace the current ISDS system. There will simply be a more diverse landscape with thousands of BITs surviving. Perhaps there will be multilateral courts in the free trade areas. It would be a more diverse landscape, but ISDS, as it is today with different generations of BITs, would largely survive.

The ICC has a long experience with disputes involving states and state entities and also with treaty-based investment disputes. To date, the ICC has administered about 40 treaty-based arbitrations, and it released in January of this year the guidance note on ICC procedure, covering investment arbitration.[27] Specifically, in investment arbitration, the parties can adopt full transparency in ICC proceedings as in UNCITRAL proceedings.[28] Furthermore, and by way of clarification, article 25 of the ICC rules authorizes the tribunal to accept submissions from non-disputing parties.[29] The note also encourages full disclosure by prospective arbitrators regarding all the treaty-based cases they have participated in as arbitrator, counsel, or expert. Finally, the note states that awards are scrutinized by court members with experience in investment arbitration and that awards will be published within six months unless the parties agree otherwise.

It is worth remembering that investment protection in the early years was based on contract. The same was true for the first years of ICSID, and I believe that the current landscape will lead to more investment protection based on a contract. This is a welcomed development. Given the ICC's experience, it may have an important

[27] *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration* at 19-20 (Jan. 1, 2019), https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf.

[28] *Id.* at 19. *Cf.* UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014), art. 1 (allowing parties to agree to apply the transparency rules).

[29] ICC Rules of Arbitration (2012), art. 25(3).

role to play in that context. With contracts, the parties can frame the procedures that are better suited for investment disputes. For instance, states have recently asked the ICC to draft a model clause for an investment contract providing for an appeals mechanism, which is allowed under the ICC rules. The ICC did propose a model clause to these states, and it understood that they are using the clause providing for appeals arbitration in their investment contracts.

ANDREW CLARKE: Thank you, Alexis. We have heard different perspectives on ISDS, its future and history, and its prospects of survival. It is uncertain whether we will hear the death knell of investment arbitration, but it is important to consider the consequences. Some authors like Professor Joe Stiglitz at Columbia University believe that ISDS is unnecessary for investors. He cites Brazil as an example of a country where there are no investment protections yet foreign companies continue doing business there. When investing in a foreign country there are the questions of risk, opportunity, balance, and investors have to consider what an acceptable level of risk would be to enter a particular country.

From an investor's point of view, the contractual protections in investment agreements are important, as well as the protections provided in investment treaties. These are important considerations when deciding on where to send investment dollars. Furthermore, we should remember that states are competing for those investments at a time when large investment is necessary to enable economic development and lift the poorest people out of poverty. Accordingly, the world is facing significant investment needs. If the changes to the ISDS system take place, how does the panel think these will affect necessary investment? Baiju?

BAIJU S. VASANI: The statistics show that the vast majority of investment cases are brought by small and medium sized enterprises (SMEs) and individuals, not by major companies. This is largely due to the leverage and political power that major companies have in certain countries. Changes to the ISDS system will largely affect those small and medium sized investors. As Alexis rightly pointed out, there will be a move to use more investment contracts, but the SME investors do not get investment contracts. Governments are not as concerned with these investments, but they are

important nonetheless—even the opening of a hotel brings important capital contributions and know how—and these SME investors are likely to be shut out if the system changes because they will not have the bargaining power to negotiate investment contracts.

ANDREW CLARKE: Marike, did you have a comment?

PROF. MARIKE PAULSSON: Changes to the system of ISDS will be more problematic for SMEs than for large investors; however, everyone should be concerned. The problem is that investors and state representatives—users of this system—are not involved in the current debate about ISDS reforms. For instance, at Albright Stonebridge Group we advise investors about diplomatic engagement, and we brief them about the current trends and developments in international arbitration. Many investors seem to be unaware of these developments and they are taken by surprise and are understandably alarmed because they are the ones who will be impacted by the outcome of these reforms. Furthermore, investor shoud formally engage politicians in this debate or diplomats should consult or engage with state representatives to ensure they understand that a radical replacement of ISDS should not be the first option. The first option must be to take another look at reforming the existing system.

ANDREW CLARKE: Tim?

TIMOTHY FODEN: I agree completely. Regarding Baiju's earlier point on domestic investors being treated less favorably than foreign investors, we must remember that the treaty system was meant to be proscriptive. It was meant to motivate states to change and treat foreign investors one way with the hopes that the liberal treatment afforded would extend to the domestic plane. The system has, to some extent, lost its way—forgetting that point, and there are examples in jurisprudence. In particular, the decision in *Parkerings-Compagniet* A.S. *v. Republic of Lithuania*[30] found that the State was not liable, reasoning that the investor should have known it was investing

[30] Parkerings-Compagniet A.S. v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award (Sept. 11, 2007).

in a country transitioning to democracy, which should have been part of the risk analysis.[31] The system, however, was created to help that particular investor in that particular situation, but tribunals are so fearful of commenting on a sovereign's conduct that states are allowed to get away with unlawful conduct.

ANDREW CLARKE: Peter, did you have something?

PROF. PETER CAMERON: States are aware that they must continue promoting and protecting investment; however, in the current climate, they will want to ensure they are seen as protecting their sovereignty and regulatory powers. Accordingly, it would be useful to suggest to states ways that they can both protect that sovereignty and continue providing the kind of protections that ensure a continued flow of investment. There can be a balance.

Regarding the SMEs investors, I agree the system was built to benefit some investors more than others, which is exemplified by the energy disputes in Latin America over the last ten, fifteen years. But SMEs are incredibly vulnerable to state action, and the treaty system is an advantage because of the limited leverage they have with states. When faced with negative state action, a small investor is likely to face losses even if they avail themselves of a BIT. That said the treaty system has great value because the SMEs can pull out of the country and still recover some loss– losing their shirt but not their trousers.

ANDREW CLARKE: It is interesting to consider the protections that investors thought they were getting with ISDS under the current regime. From the limited statistics that have been studied, it appears that the chances of success in investment claims are about 30 percent, and after obtaining a favorable decision, the damages awards are on average only 30 percent of the claim.[32] It is important to consider whether investors and in-house counsel find the current ISDS system sustainable and then look at whether states understand the consequences of changing the system. This is important given my concern that many investors are indeed unaware of the

[31] *Id.* ¶¶ 335-38.

[32] Susan D. Franck, *An Empirical Analysis of Investment Treaty Awards*, *in* AMERICAN SOCIETY OF INTERNATIONAL LAW, PROCEEDINGS OF THE ANNUAL MEETING, Vol. 101 (March 2007).

changes mentioned earlier.

To the panel then I ask, what are they doing to advise their clients about the prospective changes and how can they interact with the state representatives involved in the debate to encourage a more balanced discussion?

At the UNCITRAL Working Group III deliberations in Vienna, in October and November 2018, I made a similar intervention about the statistics relating to investment claims and a delegate commented to me that the discussions are not about facts but about perceptions, and that changes would be made simply because people think that changes have to be made. This is worrisome. Investors must seek out their state delegations involved in these sessions to ensure the delegates understand the facts.

Furthermore, Alexis mentioned the roundtable the ICC held in Paris, together with the UNCITRAL Working Group Secretariat. I attended that roundtable and made several comments. When I went to Vienna however and asked the Secretariat whether the results of that roundtable had been shared with the delegates, the answer was no.

I do not know how we can get the relevant data presented, or to ensure the viewpoint of investors is also heard, during the deliberations for ISDS reform. With that, I turn back to the panel to hear their perspectives.

ANDREW CLARKE: Alexis, the floor is yours.

ALEXIS MOURRE: On a related note, the manner in which the EU introduced this fundamental change to the system of investment protection is troubling because it was through a decision[33] of the European Court of Justice (ECJ), as opposed to a regulation. Because the decision is poorly drafted, it has the potential for unintended consequences for commercial arbitration. The decision reasons that because arbitral tribunals might have to apply EU law, they are not part of a judicial system, and their awards cannot be referred to the ECJ—hence allowing them to apply EU law without control by the Court—the system must be banned.[34]

[33] Case C-284/16, Slowakische Republik v. Achmea B.V., 2018 E.C.R. 158.

[34] *See id.* ¶¶ 42-60.

This same reasoning, however, could be applied to commercial arbitration where questions of European law are at issue. While this was likely not the intention of the ECJ, there should be concern over the arbitrability of EU law questions in commercial arbitration.

ANDREW CLARKE: Thank you Alexis. Baiju?

BAIJU S. VASANI: I have represented investors and states. As counsel, it is far easier to represent states than it is to represent claimants: not only do claimants carry the burden of proof, the system has many pitfalls for investors.

Furthermore, and looking at the statistics on investor success in investment claims that Andrew mentioned, the detractors of the system highlight that 30 percent of cases are settled and they argue that these should be counted as positive for claimants. Yet when states win on the jurisdiction, the detractors argue that these cases should not be counted as wins for states in the statistics because they represent claims that should never have been brought. Accordingly, the detractors argue that the statistics should only consider the merits cases, and claimants win the majority of the time. The response to that is claimants should win there most of the time because if there is a good claim and the investor is willing to spend millions in bringing the case against the state, the investor should win. That is the only reason an investor is going to spend millions.

Regarding the media coverage, the detractors have fantastic headlines: 'secret courts' and 'corporate suits taking your tax dollars.' But as investors, the public is not drawn by articles on a system that protects investment—it is not a sexy story. The detractors have a stronger voice in that sense.

To turn the tide, we will need to see the corporate world seeking out their government representatives to defend the ISDS system. Reflecting on the 70s or 80s when the United States was quite nationalistic, and Europe conversely was a proponent in the ISDS debate, it was not until corporate America pleaded to the State Department that they were being left behind that the Department began supporting ISDS. The corporate world must convene and make a stand like the detractors are doing.

TIMOTHY FODEN: I agree with what Baiju said.

PROF. MARIKE PAULSSON: Regarding the question of whether the ISDS debate is focusing on facts and real data as opposed to 'fake news,' the recent book by Jeffery Commission and Rahim Moloo[35] is important for anyone participating in the UNCITRAL Working Group to get a better understanding of the factual circumstances surrounding ISDS. A lot of what we are hearing is media and mere perceptions, which is not helpful when a group aims to proceed to replace an existing and functioning system radically.

A troubling point worth mentioning is that some state representatives who are also arbitration specialists argue that having an investment court is a reform while staying with the current system is radical. This line of argument makes no sense, and it is almost propaganda. As to the struggle to have an informed debate, I asked Judge Schwebel some years ago what he thought about Senator Elizabeth Warren's strong anti-ISDS statements, to which he replied, "[I]it is not as if those statements are informed statements." That was a diplomatic way of giving his opinion. It is crucial for politicians and State delegates to make informed statements and choices.

ANDREW CLARKE: Peter, any thoughts on what we can do?

PROF. PETER CAMERON: I am an optimist, and I think we just need to engage in a certain amount of education. That said I want to reflect on a comment by the CEO of the African Legal Support Facility that went, "As long as African countries continue to fall prey to the predatory activities of vulture fund litigations, and as long as they continue to sign poorly structured agreements, our staff will maintain its vigilant posture prepared to redouble its efforts in the field of legal support." The first part suggests that there are vulture fund litigations, which is unclear whether that was meant to apply to ISDS. The second part, however, about poorly structured agreements seems to be a major part of the problem: it takes two to reach an agreement, including poorly structured deals.

Tim mentioned Tanzania earlier and the mineral agreements, which is a good

[35] JEFFERY COMMISSION AND RAHIM MOLOO, PROCEDURAL ISSUES IN INSTITUTIONAL INVESTMENT ARBITRATION (2018).

example. The issue does not only concern resource nationalism. These agreements appear to have been completely illegitimate as far as the government is concerned and hence disputes arise, particularly in the mineral and the energy sector. Notwithstanding that, this scenario is not the fault of ISDS; it is caused by agreements that should have been better negotiated. In the ISDS debate then, there are alternative legal service providers taking a negative view on ISDS. To counter that, we must emphasize the many examples of globalized investment agreements that have benefited states. Moreover, I am sympathetic to investors on this point because it is actually not their job to be involved in the agreement ratification process. They are not lobbyists. They are engaged in business; they are investing.

Finally, there is no united European position on ISDS reform. Finland and Hungary and few others recently clarified that they do not view European law as undermining the role of the ECT. There is a dissent among the 27-member state union, which does create hope for investors regarding the European position in the ISDS debate.

ANDREW CLARKE: Thank you, Peter. It is correct to say that the structure of investment protection was created by states, in their own interests to encourage and facilitate investment. If there is a movement to change the system, it is only appropriate to allow investors to inform them about the potential consequences so states can take whatever action they deem appropriate, but it is a decision that remains entirely with the states.

Returning to the panel, I ask if any has a good idea for this discussion.

PROF. MARIKE PAULSSON: When looking at the ISDS system and the *status quo* that currently exists within the international arbitration community, it is important to consider the broader context and adopt a holistic approach. We must be cognizant that in dispute resolution there are other factors involved, such as diplomatic, political, environmental factors, human rights, etc. Furthermore, we must advise investors that arbitration is not always the only strategy. Often, it is not a strategy at all. Investors need to be provided with a holistic strategy, and counsel must emphasize that there are other options that include mediation, conciliation, and commercial diplomacy, especially in light of the recently concluded UN Convention

on International Settlement Agreements Resulting from Mediation.[36]

TIMOTHY FODEN: Fight fire with fire. The detractors use alarmist's rhetoric, so we can too.

ANDREW CLARKE: Okay, thank you. Peter?

PROF. PETER CAMERON: I strongly suggest we communicate to states that the exercise of their legitimate regulatory powers is not in question. It is a matter of setting some limits for the exercise of those powers in dealing with often long-term, complex, and capital-intensive projects, to get them off the ground. The rules to see these projects through are not threatening; they simply provide investors with security in the long term.

ANDREW CLARKE: Alright, thank you. Alexis?

ALEXIS MOURRE: The striking thing about the discussions on the multilateral investment court is the complete inability of the arbitration community at large to engage in a discussion with the EU. We have been in denial, saying either it is a bad project, or it will not work or they will not do it. I think it might happen and it is already happening. We must engage in a dialogue that is more positive with the EU, particularly in conveying the aims of our propositions and the importance of neutrality. All this for preserving a balance between investors and states, and the effectiveness of the system. A system under a multilateral court, if it is limited to a few judges and completely excludes international arbitrators, will be ineffective. These are concerns that we must convey to the EU commission. We must not be in denial in order to do it. We must understand that it is not a dialogue that can be pressured because there is strong political will on the part of the EU, and this will not change. We must convey our proposals from a technical standpoint to improve what is being submitted for reform.

ANDREW CLARKE: Thank you. I believe that Baiju has now come up with an idea.

BAIJU S. VASANI: We must adjust the current system to remove the points of conflict from the debate. For instance, ICSID has done a fantastic job of bringing fresh

[36] United Nations Convention on International Settlement Agreements Resulting from Mediation, Dec. 20, 2018, U.N. Doc. A/73/17 (opening for signature on Aug. 7, 2019).

arbitrator blood into the system. A point that is often mentioned is that there are only a handful of arbitrators deciding the majority of arbitration cases, which is a negative aspect of the system. Furthermore, the lack of diversity among the handful of arbitrators is disheartening. Broadening the class of appointed arbitrators and enhancing diversity can remove the points of contention from the ISDS reform debate.

Similarly, looking at the efforts to update the ICSID Rules of Procedure for Arbitration Proceedings,[37] states are mainly focusing on security for costs. States are opposed to third-party funders bringing cases and being unable to recoup their costs. Accordingly, modifying provisional measures that provide security for costs are the kinds of adjustments that we must look at. Making these kinds of adjustments slowly chisels away at the ability of detractors to attack the ISDS system.

ANDREW CLARKE: That concludes the remarks from the panel. I will now open up the discussion to the floor.

ALAN CRANE: Thank you for a very interesting discussion. The comments of the panel have largely been about competing visions of multilateralism, adjustments to the ISDS system, and whether there should be a supra-national court system. From what we are seeing around the world with retrenchment and hyper-nationalism, for example, the United States, Britain and Brexit, Italy, Hungary, Brazil, you can go around the globe, is there a possibility of returning to more dysfunction? Instead of multilateralism, investors are left with less structure and support. This seems to be happening in many domestic political systems, and so it might be where we are headed.

ANDREW CLARKE: Certainly, that is a real risk. Looking at the data from UNCTAD in 2018, foreign investment shrank by 19 percent,[38] in addition to the 23 percent drop from the previous year.[39] Investment trends are weak. Part of this is due to the

[37] ICSID Rules of Procedure for Arbitration Proceedings (Apr. 10, 2006).

[38] UNCTAD, 31 INVESTMENT TRENDS MONITOR 1, 1 (2019).

[39] UNCTAD, WORLD INVESTMENT REPORT 2018: INVESTMENT AND NEW INDUSTRIAL POLICIES, at 1, U.N. Sales No. E.18.II.D.4.

international trade wars that are occurring as well as the growing nationalism. Investors have to be more careful about where they do business.

Baiju S. Vasani: I agree with you, Alan, but we must address the movement seeking to radically change the ISDS system. The concern goes to the fact that major companies are better able to cope with volatility; it is the SMEs investors, however, that play a vital role in FDI but are less able to manage volatility. Unfortunately, it is these investors that will suffer.

LUIS ENRIQUE CUERVO: I am Luis Enrique Cuervo, a practicing attorney at Jackson Walker LLP in Houston. Thank you for the presentation. We have not heard much about the mystery and intricacies of human adjudication. For this I want to suggest a comparison. Soccer has been played worldwide, perhaps for longer than we have been dealing with international investment issues. Sometimes referees are scolded when teams lose or win, but everyone continues wanting to play soccer. This is an interesting thought when compared with international arbitration. No one is suggesting that referees be banned, or the game discontinued. There are, however, certain comparisons that are worth noting, such as the games are played and viewed worldwide with full transparency. There is no concern over the knowledge of the rules; everyone knows the rules; and the referees are supposed to enforce them.

Lastly, I have not heard comments regarding professionalism. No one would accept a world cup where a referee has worn the jersey of a team playing in the final. That is a comparison worth considering because everyone enjoys soccer, continues wanting to play the game, and these comparisons could be helpful for considering the future of international arbitration.

ANDREW CLARKE: That is a very interesting comparison. It relates to a discussion I had with state delegates at the UNCITRAL Working Group III discussions where one mentioned that the ISDS debate has become an issue of perceptions. When a state loses an arbitration, they demonize the tribunal and the investor. Nobody focuses on whether the arbitral tribunal arrived at the correct decision and whether the state, for example, ignored its obligations under the stability provisions. As in soccer, you do not see coaches conceding that it was indeed a penalty and their player simply

erred. So, it is a very interesting comparison. Thank you for that thought.

PROF. MARIKE PAULSSON: On the subject of double hatting, if we lived in an idealist Don Quixote world, it would be acceptable to act as counsel or as arbitrator. In an ideal world, we would have law firms where specialists mainly act as arbitrators and firms that focus on counsel work. In the real world, however, there is a strong call for broadening the pool of arbitrators and enhancing diversity. How do we broaden the pool and make it more diverse? We must enable young people to get experience. That said there is an interesting conundrum with younger practitioners that claim they cannot wait for their first arbitrator appointment for which they would have to leave the counsel practice altogether because they cannot wear two hats. There is a sort of twilight zone in the transition phase from counsel to arbitrator, and it is a reality for many up and comers. Not everyone has the opportunity to gain experience as tribunal secretaries, which is the best training for becoming an arbitrator. In a world of MAN OF LA MANCHA, we could wear a single jersey, but this is not how the world functions today.

CONSTANTINE PARTASIDES: Thank you. Let me first congratulate the panel for a stupendous series of interventions—very enjoyable and thought-provoking.
I have a silver bullet. Turning to the soccer analogy, imagine if the world's soccer matches were taking place behind closed doors with no one watching. Imagine what people would say about what was happening in those matches. If the world of international arbitration has nothing to hide, it should open its doors. This is an exhortation that we face and must listen to because we are moving into an age where transparency is valued. The best defense for the ISDS system is to allow people to see it in action.

ANDREW CLARKE: Very good, Constantine. I think one of the greatest challenges will be persuading states to go with that approach. With that, I draw this panel to a close. I want to thank the panel participants, three of whom have written papers on the topics discussed. Again, thank you to all the panel participants for their active involvement in this.

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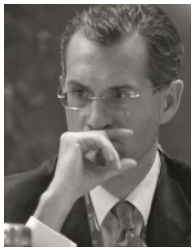

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